IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORIGINAL SIDE

NOTICE OF MOTION NO.2251 OF 2004
IN
APPEAL NO.487 OF 2004
IN
ARBITRATION PETITION NO.288 OF 2004

The Board of Trustees of the
Port of Bombay — Appellants

versus

Afcons Infrastructure Limited — Respondent

Mr.V.A.Thorat, Advocate General with Mr.Umesh Shetty
i/b. M/s.Mulla & Mulla for the appellants.

Mr.I.M.Chagla, senior counsel with Dr.Virendra
Tulzapurkar, senior counsel and Mr.Harvinder Toor i/b.
M/s.Crawford Bayley & Co. for the respondent.

CORAM : R. M. LODHA &
J.P. DEVADHAR,JJ.

DATED : 9th August 2004

P.C.

Heard.

2. The appellants have been able to make out a prima facie case as the appeal has been admitted. However, looking to the aspect of balance of convenience, we are of the view that the operation of the impugned order does not deserve to be stayed. It is so because the respondent-contractor has yet to complete the contract

and further payment shall be required to be made by the appellants to the respondent-contractor. The controversy before us is relating to deduction of liquidated damages under clause 47.1 of the contract from interim bills. Such deduction can always be made at the time of finalisation of the bills of the contractor, if necessary. On the other hand, if the operation of the impugned order is stayed, that may result in liquidity constraint for the contractor. But for the deduction of the disputed amount towards liquidated damages, the said amount was payable to the contractor for the work done under the interim bills. The withdrawal of the amount by the respondent-contractor is conditional on furnishing the bank guarantee. In this view of the matter, we are satisfied that the operation of the order does not deserve to be stayed. However, we clarify that in case the appeal is not heard finally before the finalisation of respondent's bills by the appellants, the appellants shall be at liberty to apply to this Court for permission to deduct the subject liquidated damages while making the payment finally to the respondent.

3. The time granted by the learned Single Judge for deposit of the amount by the appellants is extended by a further period of three days.

4. Notice of motion is disposed of accordingly.

The parties may be provided ordinary copy of this order duly authenticated by Court Associate on payment of usual copying charges.

(R.M. LODHA, J.)

(J.P. DEVADHAR,J.)